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No. 05-11304

In The Supreme Court of the United States

LAROYCE LATHAIR SMITH,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

BRIEF OF THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE ABNER J. MIKVA, AND THE HONORABLE WILLIAM A. NORRIS, FORMER JUDGES OF THE UNITED STATES COURTS OF APPEALS, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable Abner J. Mikva, and the Honorable William A. Norris, submit this *amicus curiae* brief in support of the petitioner, LaRoyce Lathair Smith.[1]

INTEREST OF AMICUS CURIAE

This amicus curiae brief is submitted by former judges of the United States Courts of Appeals, who maintain an active interest in the fair and effective functioning of the criminal justice system.[2] *Amici* are concerned about the important issues presented in this case regarding judicial administration and federalism, and submit this brief to urge this Court to grant review to reaffirm that lower courts, on remand, must comply with

[1] No counsel for a party authored this brief in whole or in part. The Texas Defender Service made a monetary contribution to pay some of the costs of printing this brief but, other than that no person or entity other than amicus and their counsel made any monetary contribution toward the preparation or submission of this brief. Letters indicating the parties' consent to the filing of amicus briefs have been submitted to the Clerk.

[2] The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court of the Western District of Pennsylvania from 1991 to 1992. The Honorable Abner J. Mikva served as a judge of the United States Court of Appeals for the District of Columbia Circuit from 1979 to 1994, and as Chief Judge of that court from 1991 to 1994. He also served as White House Counsel from 1994 until 1995. Prior to his judicial career he was a five term member of Congress, and a five term member of the Illinois House of Representatives. The Honorable William A. Norris served as a judge of the United States Court of Appeals for the Ninth Circuit from 1980 to 1997.

this Court's mandates and must not invent new procedural obstacles to avoid compliance. Although there are other issues presented in the petition, this brief focuses on the central feature of the case: the lower court's resistance to implementation of this Court's mandate. The manifestation of that resistance – the creation and application of a harmless error analysis that had never before been applied in this case or context – is the focus of this brief. Amicus curiae care deeply that constitutional guarantees – particularly in death penalty cases, where they must be protected with particular zeal – are enforced. What the state court has done in this case is flout this Court's interpretation of those guarantees. Such an action should not be permitted to stand, for it undermines the Constitution, our federal system, and this Court's role in the enforcement of limits imposed by both.

The issues presented by this case are therefore of vital importance to attorneys who care deeply about these issues, and have played a central role in the administration of justice.

FACTS AND PROCEDURAL HISTORY

In 1991, LaRoyce Smith was convicted of murdering one of his former co-workers at a Taco Bell in Dallas County, Texas. The State sought the death penalty and at the penalty phase, Smith's attorney presented as mitigating circumstances evidence that Smith had learning disabilities and a low IQ; that his father was a violent drug addict; and that he was only nineteen when he committed the crime.

The jury was instructed on two special issues: first, whether the killing was deliberate; and second, whether the defendant posed a continuing danger to others. Under Texas law, affirmative answers to those two questions mandated the death penalty.

Two years prior to Smith's trial, this Court held that presenting only these two special issues, without additional instructions regarding the jury's duty to consider mitigation evidence, violated the Eighth Amendment. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*). Shortly after Smith's trial, the Texas Legislature amended its capital sentencing scheme to require juries to take "into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" in deciding whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e)(1) (Vernon Supp.2001).

Smith, however, did not receive the benefit of the new statutory instruction at his trial. Instead, just as in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), Smith was sentenced pursuant to a supplemental instruction provided to the jury by the trial judge. The judge gave a supplemental "nullification" instruction directing the jury that it could respond to Smith's mitigating evidence by answering "No" to one of the two special issues, even if the evidence otherwise required an affirmative answer.

As this Court explained when this case was before it previously:

> The jury verdict form tracked the final reminders the prosecution gave the jury. The form made no mention of nullification. Nor did it say anything

> about mitigation evidence. Instead, the verdict form asked whether Smith committed the act deliberately and whether there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury was allowed to give 'Yes' or 'No' answers only. The jury answered both questions 'Yes' and sentenced petitioner to death.

Smith v. Texas, 543 U.S. 37, 42 (2004).

The Texas Court of Criminal Appeals rejected Smith's request for postconviction relief, reasoning that his mitigating evidence was not constitutionally significant and that the nullification instruction provided a sufficient vehicle for the jury to consider the evidence. *Ex parte Smith*, 132 S.W.3d 407, 413-417 (2004).

This Court, in a *per curiam* opinion, reversed the Texas Court of Criminal Appeals. *Smith v. Texas*, 543 U.S. 37 (2004). The Court concluded that Smith's evidence was relevant for mitigation purposes. It criticized the Texas court for failing to follow the "plain" meaning of the Court's precedent and for relying "on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (citing *Tennard v. Dretke*, 542 U.S. 274 (2004)). The Court held that the jury instructions at petitioner's trial were "constitutionally inadequate" because they did not allow jurors to give appropriate consideration to that mitigating evidence. *Id.* at 48. The Court noted that "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." Thus the Court declared, "[i]ndeed, we have held that a defendant's IQ score of 79, a score slightly higher than petitioner's, constitutes relevant mitigation evidence." *Id.* at 44. The Court explained that

"petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence." As the Court explained, "the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.*

This Court's conclusion could not have been clearer:

> There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*.

Id. at 48. The Court therefore reversed and remanded for further proceedings not inconsistent with its opinion. *Id.* at 48-49.

Yet, on remand, the Texas Court of Criminal Appeals disregarded this Court's analysis, refused to consider the permissibility of the jury instructions, and reaffirmed the death sentence. The Texas Court of Criminal Appeals interjected a new procedural obstacle to Smith's federal claim: harmless error analysis. *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006). The court again, as it did before this Court's decision, questioned the relevance of petitioner's mitigation evidence, *id.* at 464-466, and concluded that the nullification instruction provided an adequate vehicle through which the jury could consider that evidence. *Id.* at 468-472.

In other words, the Texas Court of Criminal Appeals upheld exactly the instructions which this Court, in this case and others, has deemed to be an insufficient basis for

imposing a death sentence. The resulting decision not only is inconsistent with this Court's guidance on the precise question at issue, but even more seriously, it undermines the constitutional authority of this Court for a state court to so blatantly disregard its mandate.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE CONCERNING THE OBLIGATION OF STATE COURTS TO COMPLY WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

A. The Texas Court Of Criminal Appeals Acted In Disregard Of This Court's Decision And Mandate.

This Court could not have been clearer or more emphatic in its earlier *per curiam* opinion in this case: the instructions to the jury were constitutionally defective under clearly established law as articulated by this Court in cases such as *Penry I*, *Penry II*, and *Tennard*. The mandate from this Court was "for further proceedings not inconsistent with this opinion." 543 U.S. at 49.

The Texas Court of Criminal Appeals, however, ignored this mandate and created a new procedural bar, one that it rejected earlier, harmless error analysis. According to the court, Smith failed to show "egregious harm" because he failed "to provide any persuasive argument that the jury was unable to consider the totality of his extensive mitigating evidence." *Ex parte Smith*, 185 S.W.3d at 471. The court reexamined Smith's mitigation evidence, and concluded that almost all such evidence was, in fact, "encompassed under the 'future dangerousness'

special issue," with the remainder likely covered by deliberateness. *Id.* at 465-466; *see also id.* at 472.

But this was inconsistent with this Court's express conclusion that Smith's mitigation evidence did not fit "within the scope of the special issues" in such a way that the jurors could properly consider and give effect to that evidence. *Smith*, 543 U.S. at 47-48 (quoting *Penry II*, 532 U.S. at 799-800). After carefully reviewing the instructions and the mitigation evidence, this Court stated: "Just as in *Penry II*," the questions regarding "deliberateness and future dangerousness . . . had little, if anything to do with the mitigation evidence petitioner presented." 543 U.S. at 47.

Despite this express holding, the Texas Court of Criminal Appeals nonetheless found that the jury's instructions were constitutionally adequate. Moreover, the Texas Court of Criminal Appeals disregarded this Court's holding that the nullification instruction given to the jurors placed them in an impermissible ethical dilemma. As this Court explained in *Smith*, it would have been "both logically and ethically impossible for a juror to follow both" the instructions relating to the special issues and the instructions relating to mitigating evidence. 543 U.S. at 46 (quoting *Penry II*, 532 U.S. at 799). "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a 'true verdict.'" *Id.* (quoting *Penry II*, 532 U.S. at 800).

Furthermore, for Eighth Amendment purposes, the jury instruction in *Smith* was indistinguishable from the one the Court had previously ruled unconstitutional in *Penry II*. This Court stated:

> [T]he clearer instruction given to petitioner's jury did not resolve the ethical problem. . . . To the contrary, the mandatory language in the charge could possibly have intensified the dilemma faced by ethical jurors. . . . [T]he jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.

543 U.S. at 48 (internal quotations omitted).

This Court thus expressly held that the nullification instruction did not allow the jurors to give consideration and effect to the mitigating evidence. But, on remand, the Texas Court of Criminal Appeals dismissed the ethical dilemma as a mere "possibility," insufficiently real to warrant granting Smith a new penalty trial. *Ex parte Smith*, 185 S.W.3d at 468 (internal quotations omitted).

It is simply impossible to reconcile the Texas Court of Criminal Appeals' decision with this Court's holding and mandate. This Court found that the jury instructions were not a constitutionally permissible basis for imposing a death sentence, but the Texas Court of Criminal Appeals, on remand, came to exactly the opposite conclusion.

B. The Texas Court Of Criminal Appeals Created A New Procedural Bar To Thwart Compliance With This Court's Decision.

On remand from this Court, the Texas Court of Criminal Appeals said that the appropriate standard for determining harmless error was whether there was "egregious harm," rather than "some harm," because Smith failed to adequately raise his claim of jury-charge error at the trial level. *See Ex parte Smith*, 185 S.W.3d at 463-64, 468 (citing *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984)).

But the Texas Court of Criminal Appeals had twice before rejected the argument that Smith failed to preserve his jury charge claim, and had previously addressed the merits of the claim without imposing any procedural barriers. *See Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994); *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004).

In fact, this Court, when first reversing the Texas court, expressly noted that the Texas court had declined to find Smith's claim procedurally defaulted and had instead decided it on the merits. *Smith*, 543 U.S. at 43 n.3. Only after the Texas Court of Criminal Appeals received an unfavorable ruling on the merits from this Court did it devise a theory of unpreserved error and impose a new procedural bar: requiring Smith to show that there was an egregious error. The conclusion is inescapable that it did so solely to avoid compliance with this Court's mandate and to prevent further review by this Court.

The Texas Court's application of a heightened standard of "egregious harm" is entirely unprecedented – it has *never* before been applied by the Texas Court in the analysis of the merits of a *Penry* claim. Indeed, this is the *first* case where the Texas Court has *ever* denied relief based on harmless error analysis. It was not until 2005 – after this Court's remand in this case – that the Texas Court of Criminal Appeals applied harmless error in granting relief in its review of the *Penry* claim before it in *Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005). Of the few previous cases in which *Penry* relief was granted, harmless error analysis is entirely absent. *See, e.g., Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Williams*, 833

S.W.2d 150 (Tex. Crim. App. 1992); *Rios v. State*, 846 S.W.2d 310 (Tex. Crim. App. 1992).[3] The numerous *Penry* claims denied by the Texas Court of Criminal Appeals between 1989 and 2005 are equally devoid of any discussion of harmless error. *See, e.g., Fuller (Tyrone) v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992); *Fuller (Aaron) v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993); *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Crim. App. 1994); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995); *Mason v. State*, 905 S.W.2d 570 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500 (Tex. Crim. App. 1995); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996).[4] The conclusion that the application of harmless error analysis – heightened or otherwise – is novel and aberrational is unavoidable.

Further examination of the Texas Court's treatment of *Penry* claims affirms the evasive nature of its actions in this case, and the inadequacy and irregularity of the rule it attempts to invoke to bar this Court's review. Previously, the Texas Court applied a "right not recognized" exception to the contemporaneous objection rule. *See, e.g., Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991); *Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001); and *Ex*

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[3] Of course, this Court did not apply a harm analysis in the course of finding Mr. Penry entitled to relief in *Penry I* or *Penry II*.

[4] As the captions reveal, the citations are to direct appeal cases. The Texas court's practice has been to reject habeas petitions in postcard orders, which are far less amenable to analysis. Nonetheless, counsel's research, though limited by the manner and circumstances of the habeas denials, has not revealed a single habeas case – until this one – in which the Texas Court of Criminal Appeals has applied a harmless error analysis when considering a *Penry* claim.

parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972). *See also Smith*, 185 S.W.3d at 475 (Holcomb, J., dissenting) ("[i]t should go without saying that a defendant does not waive his right to assert a constitutional violation by failing to object at trial if, at the time of his trial, that right had not been recognized." (citations omitted). Applying this rule, in *Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991) the Texas Court granted relief on a *Penry* claim, although the petitioner conceded that he failed to object to the charge complained of, as the novelty of the *Penry* decision permitted an appellant to raise the issue for the first time on appeal (citing *Black v. State*, 816 S.W.2d 350 (Tex. Crim. App. 1991)).

Now, the Texas court has faulted petitioner for failing to anticipate the decision of this Court in *Penry II*, and object accordingly.[5] Unable to avoid the precedent of *Black v. State*, which refused to hold petitioners responsible for a lack of clairvoyance, the court instead applied, for the first time, an ad hoc heightened harm standard that is apparently only invoked in instances of "semi" inadequate instructions.

The Texas court's treatment of Penry claims is chaotic at best. Its application of a harm standard to such claims is entirely novel. There is no established practice requiring a showing of harm – let alone egregious harm – for *Penry* violations based on purportedly inadequate objections at

[5] Indeed, the Texas Court recently held that the problems with the nullification instruction that this Court recognized in *Penry II* and reaffirmed in *Tennard*, were not previously recognized, and were thus considered "new law" permitting consideration of a successive habeas petition raising a *Penry II* claim. *See Ex parte Robertson*, AP 74,720 *23 (Tex. Crim. App. Mar. 16, 2005) (unpublished).

trial. As Judge Holcomb stated: "Our application of error preservation rules, as of late, have been applied capriciously and arbitrarily by this court; therefore a self-proclaimed "adequate" procedural bar cannot insulate the majority's holding from federal review." *Smith*, 185 S.W.3d at 475 (Holcomb, J., dissenting) (citing *Henry v. Mississippi*, 379 U.S. 443, 447 (1965); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)).

C. This Court Should Grant Review To Reaffirm That A State Law Procedural Bar Cannot Be Created To Prevent Supreme Court Review Or Compliance With A Supreme Court Decision.

It is firmly established that a state court may not inconsistently employ a state procedural rule as a means to thwart this Court's review. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456, 457-458 (1958). This Court has been emphatic that only "firmly established and regularly followed state practice . . . can prevent implementation of federal constitutional rights." *James v. Kentucky*, 466 U.S. 341, 348-349 (1984).

This Court has repeatedly refused to permit state courts to apply a state-law procedural ground for the first time on remand in order to evade this Court's rulings on a question of federal constitutional law. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 244-245 (1959) (citing *Sibbald v. United States*, 37 U.S. (12 Pet.) 488, 492 (1838)); *Tyler v. Magwire*, 84 U.S. (17 Wall.) 253, 284-285 (1872).[6] But that is exactly what occurred here: the Texas

[6] For example, this court has held that a state law ground of decision is not an independent and adequate state ground if it is

(Continued on following page)

Court of Criminal Appeals invoked a procedural rule that is not "firmly established and regularly followed" on remand to evade this Court's rulings on a question of federal constitutional law.

This Court's many prior decisions limiting the ability of state courts to invent state law grounds or to use inconsistently applied state law grounds to prevent Supreme Court review apply in this case with special force. Here, the Texas Court of Criminal Appeals used the state law grounds, the "egregious error" standard, to avoid compliance with a specific holding of this Court in this case. The Texas Court concluded that Smith suffered no egregious harm because the jury was able to consider most, if not all, of the evidence. *Ex parte Smith*, 185 S.W.3d at 471-72. But this Court expressly found that the instructions were inadequate and the jury's ability to consider the evidence

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created for the purposes of frustrating Supreme Court review. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *James v. Kentucky*, 466 U.S. 341 (1984). Also, the Court has held that state law cannot constitute an independent and adequate state ground if it is a state rule that is not consistently followed within the state. *See, e.g., Lee v. Kemna*, 534 U.S. 362 (2001). *Barr v. City of Columbia*, 378 U.S. at 149 (state procedural rules "not strictly or regularly followed" may not bar review); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 457-458 ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.").

Thus, there is no merit to the concurring opinion's assertion that the egregious harm standard constitutes an independent and adequate state-law ground and therefore deprives this Court of jurisdiction. *See Ex parte Smith*, 185 S.W.3d at 472-73 (Hervey, J., concurring). Since the egregious error standard was created for the purpose of frustrating review by this Court, indeed to prevent compliance with this Court's order, and since it is not a consistently applied rule, it cannot be an independent and adequate state law ground.

was insufficient to meet the Constitution's requirements. *See Smith*, 543 U.S. at 38, 48.

Thus, this case presents an issue of great national importance concerning the supremacy of federal law and the duty of courts, on remand, to comply with the mandates of this Court. *Amici*, former federal court of appeals judges, are particularly cognizant of this duty and its special application when matters are remanded to state courts. *Amici* urge this Court to grant certiorari to resolve the important question presented and to emphatically reaffirm the duty of courts on remand to comply with Supreme Court mandates and not to invent new procedural grounds to avoid compliance.

CONCLUSION

For these reasons, *amici* respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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